Folin & Brothers Sdn Bhd v Wong Foh Ling & Wong Swee Lin & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22–1464 OF 1990
ABDUL MALIK ISHAK J
8 DECEMBER 2000

Civil Procedure *— Writ of summons — Service — Amendment to original writ of summons to include twelfth defendant as party to the proceedings — Alleged irregularity in service of amended writ of summons — Service after expiration of 12 months of original writ of summons — Whether writ amended to include a new party to an existing suit is equivalent to a newly issued writ with a life span of 12 months for service from the date when the amended writ is duly stamped — Rules of the High Court 1980 O 6 r 7 & O 15 rr 6, 8*

Statutory Interpretation *— Retrospective operation — Statutes dealing with substantive rights — No retrospective effect unless indicated in statute — Rules of the High Court 1980 O 6 r 7*

The plaintiff filed the original writ of summons and statement of claim ('encl 1') on 14 September 1990 against the first to the eleventh defendants. On 8 January 1999 the plaintiff filed an application by way of summons in chambers to amend the original writ of summons and statement of claim. The amended writ of summons and statement of claim ('encl 89') was filed on 16 August 1999 and served on the twelfth defendant on 21 September 1999. The twelfth defendant made an application to set aside the service of encl 89 on the ground that the writ had lapsed and consequently the service of the writ was defective, irregular and should be set aside ex debito justitiae. The senior assistant registrar allowed the twelfth defendant's application and ruled that the amended writ summons and the statement of claim in encl 89 had failed to extend nor abridge time for the purposes of service pursuant to O 6 r 7 of the Rules of the High Court 1980 ('the RHC'). The plaintiff appealed. The issue before the court was whether a writ amended under O 15 r 6 of the RHC to include a new party to an existing suit is equivalent to a newly issued writ with a life span of 12 months for service from the date when the amended writ is duly stamped or whether it is equivalent to the original writ which it was amended from, without a new life span of 12 months unless its life span, in the first place, extended or abridge, on the assumption that the initial 12 months life span had since expired, under O 6 r 7 of the RHC.

Held, allowing the appeal:

(1) The twelfth defendant was not the original party to the suit when it was first filed but was included by way of a joinder of party. That being the case it was not incumbent on the part of the plaintiff to extend the validity period of the original writ summons and the statement of claim for the purpose of service on the twelfth

defendant under O 6 r 7 of the RHC for the reason that the twelfth defendant was not a party to the suit in the first instance (see p 35E–F). A

(2) Order 15 r 8 of the RHC is a specific provision governing the addition of the twelfth defendant whereas O 6 r 7 of the RHC is a general provision relating to practice and it envisages the situation where the writ has failed to be served on the original defendants named therein within the initial 12 months period from the date of issue. The specific provision must necessarily take precedent over the general provision (see p 41D–E). B

(3) The action was deemed to have begun as against the twelfth defendant on the date of the amendment of the writ which was on 16 August 1999 and having a life span of 12 months for the purpose of service from that date. This would be the correct interpretation to adopt when construing O 15 r 6 of the RHC to the facts of the present appeal. Thus, the service on 21 September 1999 must be construed to be good service in law. The life span of the writ as against the twelfth defendant was well within the range of 12 months at the time of its service (see p 42B–C, F). C D

(4) The amendment to O 6 r 7 of the RHC should not be construed retrospectively. The plaintiff had filed the original writ against the original defendants when the life span of the writ was for a period of 12 months and under the unamended O 6 r 7(1) of the RHC there was no limit to extend the life span of the writ. This right to the plaintiff must be protected and it is for this reason that this court could not construe the amendment to O 6 r 7 of the RHC retrospectively (see p 46G–I). E F

[Bahasa Malaysia summary

Plaintif memfailkan writ saman asal dan penyata tuntutan ('lampiran 1') pada 14 September 1990 terhadap defendan pertama hingga kesebelas. Pada 8 Januari 1999, plaintif memfailkan satu permohonan melalui saman dalam kamar untuk meminda writ saman asal dan penyata tuntutan tersebut. Writ saman dan penyata tuntutan yang telah dipinda ('lampiran 89') difailkan pada 16 Ogos 1999 dan disampaikan kepada defendan kedua belas tersebut pada 21 September 1999. Defendan kedua belas membuat permohonan membatalkan penyampaian lampiran 89 atas hujahan bahawa writ tersebut telah luput dan oleh itu, penyampaian writ tersebut rosak, luar aturan dan perlu dibatalkan ex debito justitiae. Penolong kanan pendaftar membenarkan permohonan defendan kedua belas dan memutuskan bahawa writ saman dan penyata tuntutan dalam lampiran 89 yang telah dipinda gagal melanjutkan atau menyingkatkan masa bagi tujuan penyampaian menurut A 6 k 7 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Plaintiff tersebut G H I

merayu. Perkara di hadapan mahkamah adalah sama ada writ yang telah dipinda di bawah A 15 k 6 KMT untuk melibatkan satu pihak baru ke dalam satu guaman yang sedia ada setara dengan satu writ baru yang bertempoh 12 bulan bagi penyampaian dari tarikh writ dipinda itu dicop atau sama ada ia setara dengan writ asal dari mana ia dipinda tanpa tempoh baru 12 bulan kecuali jika tempoh hayatnya, dari awal-awal lagi, dilanjutkan atau disingkatkan, atas fahaman bahawa tempoh 12 bulan dari permulaan telahpun luput, di bawah A 6 k 7 KMT.

Diputuskan, membenarkan rayuan tersebut:

(1) Defendan kedua belas bukan pihak asal kepada guaman tersebut apabila ia mula-mula difailkan, tetapi dimasukkan melalui percantuman pihak. Kerana ini, ia tidak wajib bagi plaintif melanjutkan tempoh sah bagi writ saman asal dan penyata tuntutan bagi tujuan penyampaian kepada defendan kedua belas di bawah A 6 k 7 KMT atas alasan defendan kedua belas bukan pihak kepada guaman pada permulaannya (lihat ms 35E–F).

(2) Aturan 15 k 8 KMT merupakan peruntukan khusus yang mengawal kemasukan defendan kedua belas manakala A 6 k 7 KMT adalah satu peruntukan am berkenaan latihan dan ia menggambarkan situasi di mana writ gagal disampaikan kepada defendan-defendan asal yang dinamakan dalam 12 bulan yang pertama dari tarikh ianya dikeluarkan. Peruntukan khusus ini mesti diberi kepentingan atas peruntukan am (lihat ms 41D–E).

(3) Tindakan undang-undang tersebut dikatakan dimulakan terhadap defendan kedua belas pada tarikh pindaan writ tersebut iaitu 16 Ogos 1999 dan mempunyai tempoh hayat 12 bulan bagi tujuan penyampaian dari tarikh tersebut. Ini merupakan taksiran yang betul dan patut diambil ketika menafsirkan A 15 k 6 KMT berdasarkan fakta-fakta rayuan ini. Oleh itu, penyampaian pada 21 September 1999 mestilah ditafsirkan sebagai penyampaian yang sah di bawah undang-undang. Tempoh hayat writ tersebut terhadap defendan kedua belas memang berada dalam lingkungan 12 bulan pada waktu penyampaiannya (lihat ms 44B–C, F).

(4) Pindaan terhadap A 6 k 7 KMT tidak patut ditafsirkan secara retrospek. Plaintif telah memfailkan writ asal terhadap defendan-defendan asal sewaktu tempoh hayat writ tersebut adalah bagi tempoh 12 bulan dan di bawah A 6 k 7(1) KMT yang belum dipinda tidak terdapatnya had untuk melanjutkan tempoh hayat writ tersebut. Hak plaintif ini mestilah dilindungi dan bagi sebab inilah mahkamah tidak boleh menafsirkan pindaan terhadap A 6 k 7 KMT secara retrospek (lihat ms 48G–I).

Notes

For cases on writ of summons, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 5016–5114.

For cases on retrospective operation, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1618–1629.

Cases referred to

Attorney-General v Pontypridd Waterworks Co (1908) 1 Ch 388 (refd)

Barker v Edger & Ors (1898) AC 748 PO (refd)

Battersby & Ors v Anglo-American Oil Co Ltd & Ors [1945] 1 KB 23 (refd)

Byrne v Brown (1889) 22 QBD 657 (refd)

Development & Commercial Bank Bhd v Astrid Jorunn Saniman [1991] 1 MLJ 435 (refd)

Foy, Morgan & Co (1928) P 41 (refd)

Goopan s/o Govindasamy v A Subramaniam & Anor [1980] 2 MLJ 64 (refd)

Ketteman & Ors v Hansel Properties Ltd [1988] 1 All ER 38 (refd)

Lancaster Banking Co v Cooper (1878) 9 Ch D 594 (refd)

Lee Kah Hong & Anor v Teoh Tiang Guan & Anor [1971] 1 MLJ 223 (refd)

Lim Wan Hooi v Ismail bin Hassan [1965] 2 MLJ 101 (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)

Malayan Banking Bhd v Siong Electronic Industries (1981) Sdn Bhd & Ors [1994] 1 MLJ 704 (refd)

Montgomery v Foy (1895) 2 QB 321 (refd)

Norbury Natzio & Co v Griffiths (1918) 2 KB 369 (refd)

Performing Right Society Ltd v London Theatre of Varieties Ltd (1924) AC 1 (refd)

Roberts v Holland (1893) 1 QB 665 (refd)

Robinson v Geisel (1894) 2 QB 685 (refd)

Seabridge v H Cox & Sons (Plant Hire) Ltd & AnorBarclay v Same [1968] 1 All ER 570 (refd)

Seward v 'Vera Cruz' (1884) 10 App Cas 59 (refd)

Sheldon v Brown Bayley's Steel Works, Ltd & Anor [1953] 2 All ER 382 (refd)

Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 295 (refd)

Trow v Ind Coope (West Midlands) Ltd & Anor [1967] 2 All ER 900 (refd)

Van Gelder, Apsimo & Co v Sowerby Bridge United District Flour Society (1890) 44 Ch D 374 (refd)

Wilson Sons & Co v Balcarres Brook Steamship Co (1893) 1 QB 422 (refd)

Legislation referred to

Fatal Accidents Act 1846 [UK]
Interpretation Acts 1948 and 1967 s 30
Law Reform (Miscellaneous Provisions) Act 1934 [UK]
Limitation Act 1953 s 9(1)
Malaysian Court Practice, High Court, Vol 1
Public Authorities Protection Ordinance 1948
Rules of the High Court 1980 O 6 r 7(1), O 15 rr 6(1), 6(2)(b)(i), 6(2)(b)(ii), 8(4)(a), O 15 r 8(4)(a), O 29 r 1(2B), O 32 r 13
Rules of the Supreme Court O 8 r 1, O 15 r 8(4)(a) [UK]
The Supreme Court Practice 1997, Vol 1, Pt 1

Ding See Hock (*D Mathews*) for the plaintiff.
Tang Weng Leong (*KC Yap & Partners*) for the twelfth defendant.

Abdul Malik Ishak J:

Introduction

I heard his case on the direction of the honourable CJ (Malaya) and I soon found that it was indeed an interesting case. It was in the nature of chartering a new field.

This case arose by way of a notice of appeal to the judge in chambers dated 11 May 2000 that was filed by the plaintiff against the decision of the senior assistant registrar ('the SAR') that was pronounced on 8 May 2000. That notice of appeal to the judge in chambers can be seen in encl 114 and it was a contest entirely between the plaintiff and the twelfth defendant — Pustaka Delta Pelajaran Sdn Bhd.

Facts of the case

The plaintiff — Folin & Brothers Sdn Bhd, is a company which is under liquidation. The joint liquidators in the persons of Ng Pyak Yeow and Khoo Peng Lai are maintaining the present action.

The suit was originally filed by the plaintiff on 14 September 1990 against the first to the eleventh defendants for various breaches of fiduciary duties, conspiracy to defraud, unlawful transfer, siphoning of company properties, misappropriation, falsifying payment vouchers, negligence in paying out the monies, commissions and profits plus a whole gamut of other legal breaches. Indeed, the statement of claim in its original form as framed against the first to the eleventh defendants would kindle the interest of even the dull and the uninitiated.

Some years down the line, after the suit was first filed, the plaintiff then realized, to its dismay, that there was a need to cite the twelfth defendant — Pustaka Delta Pelajaran Sdn Bhd, as a new party to the existing suit. The need to cite the twelfth defendant became apparent when the plaintiff discovered that the previous liquidators in the persons of Geh Cheng Hooi and Ramli bin Ibrahim — the tenth and the eleventh defendants

respectively, have sold the plaintiffs factory premises to the twelfth defendant. In order to challenge that sale, the plaintiff had no choice but to cite and bring into the picture the twelfth defendant. Order 15 r 6(1) of the Rules of the High Court 1980 ('the RHC') states as follows:

> No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

and the underlying purpose seems to be to bring forth all the relevant parties before the court at one and the same time so that the disputes between them would be adjudicated upon swiftly and without delay and, of course, to avoid the unnecessary expense of separate actions and trials (*Byrne v Brown* (1889) 22 QBD 657; *Montgomery v Foy* (1895) 2 QB 321 at p 324; and *Foy, Morgan & Co* (1928) P 41 (CA)). Order 15 r 6(2)(b)(i) or (ii) of the RHC adds a further leverage and it is worded in these words:

> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:
>
> (b) order any of the following persons to be added as a party, namely —
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;
>
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

and it highlights the necessity of having before the court all the relevant parties to the case (*Attorney-General v Pontypridd Waterworks Co* (1908) 1 Ch 388; *Norbury Natzio & Co v Griffiths* (1918) 2 KB 369 (CA); and *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1). But, of course, the court retains the discretionary power whether to allow or to refuse the joinder (*Lancaster Banking Co v Cooper* (1878) 9 Ch D 594; and *Roberts v Holland* (1893) 1 QB 665). *Van Gelder, Apsimo & Co v Sowerby Bridge United District Flour Society* (1890) 44 Ch D 374; and *Montgomery v Foy* lay down a singular principle of law that is worth repeating. It is this. The court will accede to the application to add the necessary parties so as to enable an effectual adjudication to be made in regard to the issues at hand. The power of the court is indeed wide and all encompassing in its scope (*Wilson Sons & Co v Balcarres Brook Steamship Co* (1893) 1 QB 422 (CA); and *Robinson v Geisel* (1894) 2 QB 685).

A So much for the law and I will now revert back to the narration of the facts.

What did the plaintiff do to facilitate the inclusion of the twelfth defendant? The plaintiff simply filed an application by way of a summons in chambers, as seen in encl 83, on 8 January 1999 and it was B supported by an affidavit affirmed by one of the joint liquidators, namely, Ng Pyak Yeow, that was dated 6 January 1999, as seen in encl 82, for the purpose of amending the original writ and the statement of claim as seen in encl 1.

In encl 82, Ng Pyak Yeow deposed that he believed that the amendments sought to be made to the plaintiffs statement of claim and the C proposed addition of the twelfth defendant was necessary in order to effectually dispose of all the matters in issue in these proceedings. Ng Pyak Yeow further deposed that in the course of undertaking the continued prosecution of the present action, both he and Khoo Peng Lai — the other joint liquidator, became aware and have been advised by the plaintiffs D solicitors that additional particulars of causes of actions were available against the tenth and the eleventh defendants, and that the sale of the plaintiffs factory premises to the twelfth defendant by the tenth and the eleventh defendants was liable to be set aside. Ng Pyak Yeow deposed that he verily believed that the facts and circumstances giving rise to these additional particulars of causes of actions and to the susceptibility of the E purported sale of the plaintiffs factory premises to the twelfth defendant being set aside arose principally from the tenth and eleventh defendants' actions as the previous liquidators of the plaintiff. It was the stand of Ng Pyak Yeow that what the tenth and eleventh defendants did were inextricably linked up to one another and it formed the facts and circumstances of the present case. It was averred that the amendments F sought to be made against the tenth and eleventh defendants as well as the addition of the twelfth defendant were designed to clarify and amplify matters already pleaded by way of further particulars. These amendments were said not to be prejudicial to any of the parties which could not be compensated by costs.

G In due course, the SAR heard the application in encl 83 and allowed it and this was on 2 August 1999. The SAR heard encl 83 pursuant to O 15 r 6 of the RHC. Since the SAR allowed the addition of the twelfth defendant to the suit, the plaintiff proceeded to file the amended writ and the statement of claim on 16 August 1999 as seen in encl 89 and the plaintiff proceeded to serve the sealed copy of the same on the twelfth defendant on H 21 September 1999.

On receipt of the service of the amended writ and the statement of claim as reflected in encl 89, the twelfth defendant instructed its solicitors to file and serve on the plaintiff a conditional memorandum of appearance dated 1 October 1999 as seen in encl 93.

I On 11 October 1999, the twelfth defendant through its solicitors Messrs KC Yap & Partners filed an application by way of a summons in chambers in encl 99 supported by an affidavit affirmed by a director of the

twelfth defendant by the name of Lim Swee Sing @ Lim Kim Wah dated 8 October 1999 in encl 98 for the purpose of setting aside the service of the amended writ of summonss and the statement of claim thereto in encl 89.

The twelfth defendant's application in encl 99 to set aside the service of the amended writ of summons and the statement of claim was heard and allowed with costs by the SAR on 8 May 2000. Being dissatisfied with the decision of the SAR, the plaintiff filed a notice of appeal to the Judge in Chambers on 11 May 2000 as seen in encl 114.

Lim Swee Sing @ Lim Kim Wah affirmed an affidavit in encl 98 and there he deposed that the Writ had lapsed and, consequently, the service of the writ to the twelfth defendant was defective, irregular, improper and should be set aside ex debito justitiae.

The arguments advanced by the parties

Both Mr Ding See Hock for the plaintiff and Mr Tang Weng Leong for the defendant repeated the same submissions that were made before the SAR.

The brunt of the twelfth defendant's application in encl 99 was that the service of both the amended writ of summons and the statement of claim were bad because at the date of service of the same on 21 September 1999, the original writ of summons and the statement of claim had lapsed in its life span for service thereof. In short, it was argued that the plaintiff had failed to effect service of the original writ of summons and the statement of claim within the 12 months period from the date of its original issuance on 14 September 1990. It was also argued on behalf of the twelfth defendant that although the writ that was served on them was the duly amended writ and statement of claim that were filed on 16 August 1999 as seen in encl 89 and served on them on 21 September 1999, yet the amended writ of summonss and the statement of claim failed to extend or abridge the 12 months life span period from its original date on 14 September 1990 to the current year of 1999 for purposes of service. That being the case, so it was argued, the service was accordingly bad.

The plaintiff, on the other end of the scale, argued that the service of both the amended writ of summons and the statement of claim as per encl 89 were regular and were done in accordance with the RHC. It was argued that the amended writ of summons and the statement of claim were made pursuant to O 15 r 6 of the RHC, and according to O 15 r 8 of the RHC an amended writ of summons and the statement of claim under r 6 of the same order would be equivalent to the issuance of a new writ. In other words, it was pointed out that the amended writ of summons and the statement of claim as per encl 89 must be deemed to be a new writ at the date of its amendment on 16 August 1999 and having a life span of 12 months for the purposes of service from that date. Since the amendment writ of summons and, the statement of claim in encl 89 were served on 21 September 1999, it was vigorously argued that the service was clearly within time and in order.

The SAR agreed with the twelfth defendant's arguments and ruled that the amended writ of summons and the statement of claim in encl 89 had failed to extend nor abridge time for the purposes of service pursuant to O 6 r 7 of the RHC. The SAR then proceeded to set aside the service of the amended writ of summons and the statement of claim.

The mathematical calculations

I need to repeat the following factual background:

(1) On 14 September 1990, the original writ of summons and the statement of claim were filed as seen in encl 1.

(2) On 8 January 1999, the plaintiff filed an application by way of a summons in chambers in encl 83 supported by an affidavit affirmed by one of the joint liquidators by the name of Ng Pyak Yeow dated 6 January 1999 as seen in encl 82 in order to amend the original writ of summons and the statement of claim in encl 1.

(3) On 16 August 1999 as per encl 89, the plaintiff filed the amended writ of summons and the statement of claim.

(4) On 21 September 1999, the plaintiff served the sealed copy of the amended writ of summonss and the statement of claim on the twelfth defendant.

Calculation wise, taking into account the filing of the original writ of summons and the statement of claim in encl 1 to the time when th plaintiff filed the application in encl 83, there was a gap of eight years months and 24 days.

From the filing of encl 1 to the period when the plaintiff filed the amended writ of summons and the statement of claim in encl 89, the delay would come to exactly eight years 11 months and two days.

Again calculated from the period of filing encl 1 to the period when the plaintiff served the sealed copy of the amended writ of summons and the statement of claim on the twelfth defendant on 21 September 1999, the delay came to exactly nine years seven days.

To the crux of the matter

The appeal in encl 114 was entirely procedural in nature. The issue of the day was whether a writ amended under O 15 r 6 of the RHC to include a new party to an existing suit is equivalent to a newly issued writ with a life span of 12 months for service from the date when the amended writ is duly stamped or whether it is equivalent to the original writ which it was amended from without a new life span of 12 months unless its life span, in the first place, extended or abridged, on the assumption that the initial 12 months life span had since expired, under O 6 r 7 of the RHC.

For starters, I have to say that a writ is valid for service for only period of 12 months from the date it is issued. O 6 r 7(1) of the RHC states as follows:

(1) For the purpose of service, a writ (other than a concurrent writ) valid in the first instance for 12 months, beginning with the date of: issue and a concurrent writ is valid in the first instance for the period validity of the original writ which is unexpired at the date of issue of t. concurrent writ.

It must be recalled that the original writ of summons and the statement of claim in encl 1 were filed on 14 September 1990 against the first to the eleventh defendants and it had expired on 13 September 1991. When the plaintiff filed the amended writ of summonss and the statement of claim on 16 August 1999 as per encl 89 and served the sealed copy of the same on the twelfth defendant on 21 September 1999, the original writ of summons and the statement of claim had not been extended pursuant to O 6 r 7(2) of the RHC. It must not be forgotten that encl 89 brought into the picture only the twelfth defendant. It was argued by Mr Tang Weng Leong for the twelfth defendant that encl 89 was no longer valid for service and, consequently, the service of encl 89 on the twelfth defendant was irregular. The case of *Development & Commercial Bank Bhd v Astrid Jorunn Saniman* [1991] 1 MLJ 435, an authority that was relied upon by Mr Tang Weng Leong, was of no assistance to the twelfth defendant at all. That was a case where Lim Beng Choon J had to deal with the issue of substituted service where the defendant claimed to be out of jurisdiction — living at c/o 94 Rue Chardon Lagarche, 75016 Paris, France, and the defendant was trying to avoid service. The learned judge, in a well written judgment, addressed his mind to the defendant's application dated 19 June 1989 in order to set aside service of the summons. His Lordship was of the view that since the defendant had filed her application before entering a conditional appearance, then her application must be tainted with irregularity. However, as the plaintiffs had not objected to the filing of the application by the defendant and had proceeded to take steps to contest the defendant's application, the plaintiffs were deemed to have waived the irregularity. The court also held that the onus of proof that the defendant had left Malaysia for France prior to the issue of the originating summons lies entirely with the defendant. The court was of the view that apart from the defendant's bare words, the defendant had not produced any concrete evidence to support her claim that she was living out of the jurisdiction. The court held that it was an easy matter for her to give the exact date of her departure for Paris from the immigration stampings on her passport. The court was not prepared to accept her bare statement without scrutinising it in the light of the totality of the evidence adduced. It can thus be seen that factually the case of *Development & Commercial Bank Bhd v Astrid Jorunn Saniman* is poles apart from the present appeal. In the present appeal, this court was not concerned with the issue of substituted service.

The case of *Sheldon v Brown Bayley's Steel Works, Ltd & Anor* [1953] 2 All ER 382 is quite thought provoking. In that case, the court had to interpret O 8 r 1 of the Rules of the Supreme Court ('the RSC') which provides as follows:

> No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any

> defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the court or a judge for leave to renew the writ ...

The rule then concludes, after dealing with the procedure for renewal, in this way:

> … and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons.

The court in that case had to consider O 8 r 1 of the RSC in the context of the brief simple facts as alluded to herein. Briefly, a widow whose husband had been killed in an accident, commenced an action against the defendants under the Fatal Accidents Act 1846, and the Law Reform (Miscellaneous Provisions) Act 1934, by way of a writ which was not served on the defendants until more than twelve months after the date of issue. The defendants entered an unconditional appearance. The court was procedurally inclined and held that the service of a writ after the expiration of the time prescribed by the rule was not an irregularity which could be rectified by waiver, and a writ in that condition when served was ineffectual for all purposes. The court concluded that the service on the defendants was a nullity and they were entitled to have it set aside. Barry J at p 385 of the report observed succinctly as follows:

> I am, however, bound to give weight to this clear expression of opinion, although it may not, in strictness, be binding on me. Indeed, be it binding on me or not, I am satisfied that it correctly represents the law in relation to this question. I find it impossible to hold that the service of a writ which is no longer 'in force' is a mere irregularity which can be rectified by waiver. Whether or not the term 'a nullity' describes the situation with complete accuracy, I am satisfied that, if not served within twelve months, a writ is dead and ineffectual for all purposes. It is true that the court has jurisdiction to infuse fresh life into the corpse but, until that jurisdiction is exercised, what was a writ is no longer a writ and is wholly ineffectual. It is, I think, no more a writ than a document in the form of a writ which could become a writ when properly sealed and issued in the Central Office of the court. The service of such a document could in no circumstances be effective, and it would be idle for a plaintiff to contend that its defect was a mere irregularity because, if it had been taken to the Central Office and the appropriate fee paid, it would, as a matter of right, have been issued as a writ.

Pure and simple, Barry J was not dealing with an application to add another party to the suit. It was a case where the writ had expired and the plaintiff made no application for the renewal of the writ within twelve months from its date. In the present appeal, it must be emphasized that although the twelfth defendant was added to the suit some eight years 11 months and two days after the suit was commenced (calculated between the filing of encl 1 with the of the filing of encl 89), yet the issue of the defence of limitation of the action was not raised by the twelfth defendant at all. At any rate, the plaintiff suit against the twelfth defendant to challenge the sale

of the plaintiffs factor premises to the twelfth defendant was instituted within the time limit. Section 9(1) of the Limitation Act 1953 enacts as follows:

> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

and flowing from it, one can readily say that any action to recover immovable property is subject to a limitation period of 12 years. In the present appeal, the cause of action accrued on 28 July 1988. Thus, when the plaintiff served the sealed copy of the amended writ of summons and the statement of claim on 21 September 1999 to the twelfth defendant, it was certainly within the prescribed time. Be that as it may, it is fortunate that the twelfth defendant did not raise the issue of limitation and thus I am spared the agonizing task of perusing through the web of legal literature on the subject matter in question. However, before I leave this interesting legal area, I must say that the court must exercise its discretion with utmost care in extending the life of a writ, particularly where the limitation period has expired because to allow an extension under such a situation would deprive the defendant of the defence that the action is time barred. If authority is required for this simple proposition of the law, I need to cite only three authorities that would certainly make for interesting reading:

(1) *Battersby & Ors v Anglo-American Oil Co Ltd & Ors* [1945] 1 KB 23;

(2) *Lim Wan Hooi v Ismail bin Hassan* [1965] 2 MLJ 101; and

(3) *Lee Kah Hong & Anor v Teoh Tiang Guan & Anor* [1971] 1 MLJ 223.

It must be emphasized that the filing of the amended writ of summons and the statement of claim in encl 89 were effected under O 15 r 6 of the RHC for the purpose of including an entirely new party, namely, the twelfth defendant to the suit and it had nothing to do with the extension of time to effect service of the amended writ of summons and the statement of claim on the original parties, namely, the first to the eleventh defendants outside the original 12 months life span of the original writ of summons and the statement of claim. I have somewhere in this judgment reproduced in verbatim O 6 r 7(1) of the RHC and I must now reproduce O 6 r 7 (2) of the RHC in its original text:

> Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.

It is clear that O 6 r 7 (2) of the RHC begins with the phrase: 'Where a writ has not been served on a defendant ...' and it envisages a situation where a writ was not served on a party named as a defendant therein within the 12 months validity period from the date when the writ was first issued. In such an eventuality, the same rule provides for an extension of time by way of an

application to the court to extend the validity period of the writ and it is in the nature of a limitless renewal. The *Malaysian Court Practice, High Court*, Vol 1 at p 94 explains that a writ served more than 12 months after its date of issue is not a nullity, it is merely not in force and it cites the case of *Trow v Ind Coope (West Midlands) Ltd & Anor* [1967] 2 All ER 900 in support thereof. It also states that in such a situation it is possible for the defendant to enter an unconditional appearance and then apply by way of summons to set aside the service of the writ. The *Malaysian Court Practice, High Court*, Vol 1 at p 95 bears the following salient passages that merit reproduction:

> An application to extend may be made under O 6 r 7 or O 3 r 5(2), even after the expiry of 12 months: *Arab-Malaysian Credit Bhd v Tan Seang Meng* [1995] 1 MLJ 525 (CA). However, the discretion of the court to allow the extension should be exercised with care and only where there are good reasons to excuse the delay: *Lloyd Triestino Societa v Chocolate Products (M) Sdn Bhd* [1978] 2 MLJ 27 (FC). In most cases a necessary first step in showing good reason for the extension is to show good reason for not serving the writ within the initial period: *Binning Bros Ltd (in liquidation) v Thomas Eggar Verrall Bowles (a firm)* [1998] 1 All ER 409 (CA).

It is germane to take cognizance of the fact that the present appeal in encl 114 was not concerned with the failure of the plaintiff to serve onto the twelfth defendant within the initial 12 months period when the original writ of summons and the statement of claim in encl 1 was filed on 14 September 1990. The twelfth defendant was not the original party to the suit when it was first filed. The twelfth defendant was included by way of a joinder of party some eight years 11 months and two days calculated from the period when encl 1 was filed to the period when encl 89 was filed. Prior to the amendment of the original writ of summons and the statement of claim in order to include the twelfth defendant as a party to the suit, the twelfth defendant was not a party to the suit at all. That being the case, it was not incumbent on the part of the plaintiff to extend the validity period of the original writ of summons and the statement of claim in encl 1 for the purpose of service on the twelfth defendant under O 6 r 7 of the RHC for the simple reason that the twelfth defendant was not a party to the suit in the first instance when encl 1 was filed. It must be recalled that the application by way of a summons in chambers in encl 83 to amend the original writ of summons and the statement of claim was only made on 8 January 1999 — approximately eight years three months and 24 days from the filing of encl 1 on 14 September 1990.

I am constrained to hold that when the SAR allowed the twelfth defendant's application in encl 99 to set aside the service of the amended writ of summons and the statement of claim by the plaintiff, the SAR had failed to consider the salient facts and the relevant points of law on the matter. It follows therefore that the decision of the SAR in setting aside the service of the amended writ of summons and the statement of claim was accordingly bad in law and should be set aside ex debito justitiae — as a matter of right. I will now venture to elaborate further by examining in some detail the following matters, not in its order of priority:

What was the effect of the amendment that brought the twelfth defendant into the picture?

I repeat and I must lay emphasis that the amendment that brought the twelfth defendant into the fold was effected under O 15 r 6 of the RHC. The effect of the amendment can readily be appreciated when one takes a look at O 15 r 8(4)(a) of the RHC which states as follows:

> Where by an order under r 6 or 7 a person is to be added as a party or is to be made a party in substitution for some other party, that person shall not become a party until —
>
> (a) where the order is made under r 6, the writ has been amended in relation to him under this rule and (if he is a defendant) has been served on him; or

The sting of O 15 r 8(4)(a) of the RHC can be fully appreciated when reference is made to *The Supreme Court Practice 1997*, Vol 1, Part 1, published by Sweet & Maxwell 1996, where the learned authors at p 226 under column entitled 'Service of amended writ' said:

> Under this rule, a defendant added or substituted as a party in the action by an order under r 6, must be served with the amended writ as if it were the original writ, ie personally or where this is impracticable by substituted service (see O 10 r 1 and O 65 rr 2–4).

And at the next page, the learned authors continuing in *serious vein saic* under the column entitled 'Added or substituted person becoming party to the action':

> When an order is made under r 6, to add a person as a party o to substitute him for a party to the action, the added or substituted part does not become a party until the date on which the amended writ is served on him (*Ketteman and others v Hansel Properties Ltd* [1987] AC 189 (HL) overruling *Seabridge v H Cox & Sons (Plant Hire) Ltd & Anor, Barclay v Same* [1968] 2 QB 46; [1968] 1 All ER 570 (CA)) The amendment of the original writ adding or substituting a person as . party under r 6, is the equivalent of the issue of a new writ against that person, and the plaintiff has to serve the writ within 4 months from th amendment; see *Bank of America National Trust and Savings Associatioi v Christmas (The Kyriaki)* [1993] 1 Lloyd's Rep 137; The Times, Angus 26 1992.

Using these passages as springboards, Mr Ding See Hock for the plaintiff submitted with vigour and vitality that the twelfth defendant was joined pursuant to O 15 r 8(4) of the RHC. It was also contended on behalf of the plaintiff that a person joined as a party under O 15 r 6 of the RHC would simply mean that a new writ had been served against that person. The plaintiff heavily relied on *Ketteman & Ors v Hansel Properties Ltd* [1988] 1 All ER 38; and *Seabridge v H Cox & Sons (Plant Hire) Ltd & Anor, Barclay v Same* [1968] 1 All ER 570 together with the passages as alluded to above.

It is now opportune to examine the case of *Ketteman & Ors v Hansel Properties Ltd*, a decision of the House of Lords. That was a case where the

five plaintiffs in 1975 bought houses from the first defendants — who had built the houses in accordance with the plans and designs prepared by the third defendants, a firm of architects. The foundations of the houses which had been laid between June 1973 and June 1975, were faulty and between 11 August 1976 to 9 September 1976, all five houses began to show signs of structural damage, in the form of cracks in the walls caused by the inadequacy of the foundations. On 27 May 1980, the plaintiffs issued a writ against the builders claiming damages for breach of contract and negligence. On 25 June 1982, the plaintiffs obtained leave to join the architects as defendants to the action but the writ was not reissued until 9 September 1982, and a copy of the re-issued writ was never served on the architects. However, a copy of the statement of claim was sent to the architects and on 6 October 1982, the architects entered their defence and thereafter behaved as if they were properly joined as defendants. In the course of the closing speeches of the trial, the architects applied for and were granted leave to amend their defence by incorporating the plea that the claim against them was outside the limitation period for the following reasons:

(i) that the faulty plans and the siting of the houses were bound to cause the foundations to settle, thereby causing structural damage, and therefore the houses were said to be 'doomed from the start' so that the plaintiffs' cause of action accrued as soon as the houses were built and the limitation period expired in June 1981; and

(ii) that the architects had not been effectively joined until 6 October 1982, which was more than six years after the cracks in the walls had occurred, if that was when the cause of action had accrued.

The trial judge also granted an application by the plaintiffs for the order of 25 June 1982 — which was made by another judge, to be amended to provide for the joinder of the architects as defendants to take effect from 30 July 1982, which was less than six years after the cracks in the walls appeared. At the end of the trial, the judge gave judgment for three of the plaintiffs against the architects. On appeal by the architects and cross-appeal by the plaintiffs, the Court of Appeal held that the plaintiffs' claim against the architects was not statute-barred because: (a) the action against the architects was deemed to have commenced when the writ was first issued against the builders in 1980; and (b) the houses were not 'doomed from the start' and the cause of action accrued when the damage, ie the cracks on the walls occurred. The Court of Appeal further held that the architects ought not to have been permitted to amend their defence to plead that they had been joined until 6 October 1982 because that very plea could have been raised earlier. The Court of Appeal then dismissed the architects' appeal. The architects appealed to the House of Lords and the following issues were ventilated:

(a) when the plaintiffs' cause of action accrued and whether the houses were 'doomed from the start';

(b) what was the date of the joinder of the architects as defendants was;

(c) whether the joinder related back to the date when the writ was originally issued against the builders; and

(d) whether the architects should have been granted leave to amend their defence to plead their late joinder.

The House of Lords deliberated at great length and held that the building was not 'doomed from the start' merely because it had a latent defect which would inevitably result in damage after it was built. Since a latent defect in a building did not give rise to a cause of action until the damage had occurred, it followed that the plaintiffs' cause of action accrued, and the limitation period began to run when the damage, ie the cracks in the walls, occurred in August and September 1976 rather than when the houses were built in 1975. The House of Lords too held that under O 15 r 8(4) of the RSC which provides that:

> Where by an order under r 6 or 7 a person is to be added as a party … that person shall not become a party until — (a) where the order is made under r 6, the writ has been amended in relation to him under this rule and (if he is a defendant) has been served on him …

It simply meant that a person added as a defendant to an action did not become a party until the writ was amended and the amended writ was served on. Although the amended writ had never been served on the architects they had however, waived the necessity for such service by serving a defence 6 October 1982 and accordingly they had become parties to the action that date. On this point, the House of Lords seemed to have overruled *Seabridge v H Cox & Sons (Plant Hire) Ltd & Anor, Barclay v Same*.

The House of Lords also held that where a person was added as a defendant to an action the joinder did not relate back to the issue of the writ against the original defendant. Instead, the action was brought against the added defendant on the date when that defendant was joined as a party to the action. For that reason, the House of Lords held that the plaintiffs' action against the architects had not been brought until 6 October 1982 when the architects were effectively joined as defendants, by which time it was time barred.

The House of Lords also held that (Lord Keith and Lord Brandon dissenting), where a defendant decided not to plead a procedural bar, such as a limitation defence, before the trial and fought the case on its merits it was not open to him to amend his defence during the final stages of the trial in order to plead the procedural defence when it had become apparent that he was likely to lose on the merits. Furthermore, according to the House of Lords, there was a clear difference between amendments which sought to clarify the existing issues in dispute and amendments which sought to raise a new defence for the first time, and there was no rule of practice of invariably allowing a new defence to be raised by amendment at the end of the trial subject to the grant of an adjournment and the defendant paying costs thrown away. The matter was entirely in the judge's discretion according to the justice of the case. Since the architects had not raised the

limitation defence until at a very late stage in the action, when it was open to them to do so earlier, the House of Lords was of the view that the Court of Appeal had rightly decided that the architects should not have been allowed to amend their defence to plead that they had not joined until 6 October 1982, and in the absence of that defence the plaintiffs were entitled to succeed on their claim. The House of Lords then dismissed the architects' appeal.

Now, it must be pointed out that O 15 r 8(4)(a) of the RSC which the House of Lords in the *Ketteman*'s case had to consider is the equivalent to our O 15 r 8(4)(a) of the RHC. Lord Keith of Kinkel delivering a separate judgment in the *Ketteman*'s case was of the view that a person added as a defendant to an action did not become a party until the writ was amended and the amended writ was served on him. His Lordship was further of the view that where a person was added as a defendant to an action, the joinder did not relate back to the issue of the writ against the original defendant but rather the action was brought against the added defendant on the date when that defendant was joined as a party to the action. This was what Lord Keith of Kinkel said at p 45 of the report:

> The natural meaning of O 15 r 8 (4)(a), according to the ordinary use of language, would appear to be that a person added as a defendant does not become a party until not only has the writ bee amended but also the amended writ has been served on him.

It would appear that Lord Keith of Kinkel suggested, quite rightly, that the cause of action against the added defendant pursuant to O 15 r 8(4)(a) of the RSC arose only from the date of the amendment and service of the amended writ. His Lordship Lord Keith of Kinkel also held the view, quite rightly, that prior to the order allowing the amendment and service of the amended writ, there was no cause of action against the defendant because the defendant was not a party to the proceeding as yet.

Now, applying vigorously the views of Lord Keith of Kinkel in the *Ketteman*'s case to the present appeal, it meant that the twelfth defendant was not a party to the action until an order allowing the amendment of the original writ of summons and the statement of claim in encl 1 by adding the twelfth defendant as a party to the action was given and the service of the amended writ of summons and the statement of claim in encl 89 had been effected on the twelfth defendant. Factually speaking, the order allowing the amendment was allowed by the SAR on 2 August 1999, and the original writ of summons and the statement of claim in encl 1 were duly amended on 16 August 1999 as seen in encl 89 and served on the twelfth defendant on 21 September 1999. It would therefore be factually correct to say that prior to 21 September 1999 the twelfth defendant was not a party to the action and correspondingly there was no requirement at all to extend or abridge the original date of the writ — which was on 14 September 1990, to the current year of 1999 for the purposes of service thereto. That would be the intent and purport of the RHC. To construe otherwise would be disastrous. It would certainly be a hindrance and would unnecessarily create impracticability on the working of the rules because the plaintiff would need

to file numerous separate applications to extend or abridge the original 12 months life span for the purposes of service since every application to extend or abridge time for service would only carry with it a maximum of 12 months period per application as envisaged in O 6 r 7 of the RHC. The courts must give working life to the RHC and must construe it practically. Just imagine the absurdity of the RHC if the plaintiff in the present appeal were required to serve a writ on a non-party to the proceedings within the initial 12 months life span period of the writ. This certainly cannot be the interpretation to be attached to O 15 r 8(4)(a) of the RHC.

It must be borne in mind that the present appeal was not concerned with the failure of the plaintiff to effect service of the writ on the original parties to the suit, namely, the first to the eleventh defendants within the period of 12 months from the date of the issuance of the original writ of summons and the statement of claim in encl 1 on 14 September 1990. The present appeal was concerned with the service of the amended writ of summons and the statement of claim to the twelfth defendant some eight years 11 months and two days after the original suit in encl 1 was filed. The twelfth defendant was joined as a new party to the proceedings under O 15 r 8(4)(a) of the RHC and it was because of this that the twelfth defendant sought to set aside the service of the amended writ of summons and the statement of claim as seen in encl 99 which ultimately gave rise to encl 114.

It must be recalled that the House of Lords in the *Ketteman*'s case overruled the decision of the Court of Appeal in *Seabridge v H Cox & Sons (Plant Hire) Ltd & Anor, Barclay v Same*. But it is interesting to note that although the House of Lords in the *Ketteman*'s case only overruled that part of the decision in Seabridge on the point that the amended writ under O 15 r 8(4)(a) of the RSC took effect, for the limitation purposes, on the date of the stamping of the amended writ and not on the date of service, yet the House of Lords in restrained language did not seem to question the judgment of Lord Denning MR in the *Seabridge*'s case pertaining to the point that an amended writ under the said rule was equivalent to the issue of a writ against an original defendant. This was what Lord Denning MR said in the *Seabridge*'s case, particularly at p 572 of the report:

> It seems to me that when the amendment is made in the prescribed manner, namely, by the amendment being taken to the central office and filed and the amended writ stamped, then at that moment the amended writ takes effect as against the added defendant. That procedure is equivalent to the issue of a writ against an original defendant. Once the amendment is made, the rules as to service apply as against the added defendant, just as they do to an original defendant on the issue of a writ, see RSC, O 15 r 8(2). The result is that the plaintiff has to serve the added defendant within twelve months from the date when the amendment is made.
>
> I am prepared to hold, therefore, that when an amendment is made adding a defendant, the amendment takes effect when it is stamped in the central office. It takes effect at that moment against that defendant equivalent to the issue of the writ against him.

I reiterate that the House of Lords in the *Ketteman*'s case tacitly approved Lord Denning MR's treatment on the effect of an amended writ under O 15 r 8(2) of the RSC in the *Seabridge*'s case.

The specific provision of O 15 r 8 of the RHC as opposed to the general provision of O 6 r 7 of the RHC

It was argued on behalf of the twelfth defendant through Mr Tang Wen Leong that the amendment as advanced by the plaintiff which was effected pursuant to O 15 r 8 of the RHC was nevertheless subject to the requirement that the plaintiff has to extend the life span of the writ for service under O 6 r 7 of the RHC because every writ issued has only a life span of 12 months for service commencing from the date of issue. Flowing from this, it was further argued that the plaintiff has failed to extend the life span of the original writ and the statement of claim that were filed on 14 September 1990 to the current date when the amended writ of summons and the statement of claim were filed on 16 August 1999 and, consequently, that amendment ran foul of O 6 r 7 of the RHC and the service that was effected thereto was accordingly bad. With respect, these arguments can easily be classified and categorized as erroneous. O 15 r 8 of the RHC is a specific provision governing the addition of the twelfth defendant, whereas O 6 r 7 of the RHC is a general provision relating to practice and it envisages the situation where the writ has failed to be served on the original defendants named therein within the initial 12 months period from the date of issue. In my judgment, the specific provision must necessarily take precedent over the general provision. I am fortified in my view by certain passages that appeared in the judgments of other learned judges in the following cases:

(1) In *Barker v Edger & Ors* (1898) AC 748 PO at p 754, Lord Hobhouse had this to say:

> The general maxim is, *Generalia specialibus non derogant*. When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and on its own terms. This case is a peculiarly strong one for the application of the general maxim.

(2) In *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 (CA), Gopal Sri Ram JCA delivering the judgment of the Court of Appeal at pp 758–759 remarked that:

> There is another compelling reason for holding that the respondents have no caveatable interest in the land. It lies in the rule of construction expressed in the maxim *generalibus specialia derogant*. Where there are two provisions of written law, one general and the other specific, then, whether or not these two provisions are to be found in the same or different statutes, the special or specific provision excludes the operation of the general provision.
>
> Thus in *Commissioner of Income Tax v Shahzada Nand & Sons* AIR 1966 SC 1342, where (at p 1347) Subba Rao J said:

'Another rule of construction which is relevant to the present enquiry is expressed in the maxim *generalia specialibus non derogant*, which means that when there is a conflict between a general and a special provision, the latter shall prevail. The said principle has been stated in *Craies on Statute Law* (5th Ed), at p 205, thus:

> The rule is, that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

See also *PP v Chew Siew Luan* [1982] 2 MLJ 119.

(4) In *Seward v 'Vera Cruz'* (1884) 10 App Cas 59 at p 68, the Earl of Selbome LC observed:

> Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.

It makes for perfect sense and a comprehensive understanding of the rigors of the RHC, if one refers to the Supreme Court Practice 1997 volume 1, at p 55 which would give mileage to the argument that the specific provision in O 15 r 8 of the RHC must surely take precedent over the general provision of O 6 r 7 of the RHC. The learned authors of the Supreme Court Practice 1997 had this to say:

> The service of the writ on one of two or more defendants with the appropriate period does not make it valid for service on any of any other defendants outside the appropriate period, and therefore even they the writ may have been duly served on one defendant, renewal of the writ must be obtained so as to make it available for service as against each defendant who has not been served within the appropriate period (*Jones v Jones & Anor* [1970] 2 QB 576; [1970] 3 All ER 47 (CA)).
>
> This requirement applies in respect of each defendant named in the writ. Both common sense and the reasoning in *Jones v Jones & Anor* [1970] 2 QB 576; [1970] 3 All ER 47 (CA), indicate that it cannot apply without adjustment in respect of a defendant who is not named in a writ as originally issued, but who is added by way of amendment; in respect of such a defendant the rule must be construed as requiring service on the defendant within the appropriate period from the date of the amendment by which he is added.

That sums up the position of the twelfth defendant who was added as a party to these proceedings under O 15 r 6 of the RHC.

The 'Relation Back Theory' as opposed to the 'No Useful Purpose Theory'

These two theories may shed some light in determining the crucial issue of whether the amended writ in encl 89 need to be extended or abridged pursuant to O 6 r 7 of the RHC or whether an amendment under O 15 r 6

of the RHC can automatically be considered as equivalent to a newly issued writ and therefore excused from the need to apply for an extension of time under O 6 r 7 of the RHC. In short, what was the effect of the amendment by joining the twelfth defendant as a party? That is the question that begs to be answered.

The Court of Appeal in *Liff v Peasley & Anor* [1980] 1 All ER 623 had occasion to determine the acid question of whether the joinder takes effect from the date of the original writ or from the date when the writ was amended. Lord Brandon LJ distinguished the 'relation back' and the 'no useful purpose' theories in this way (see p 639 of the report):

> There are two alternative bases on which the rule of practice can be justified. The first basis is that, if the addition were allowed, it would relate back so that the action would be deemed to have been begun as against the person added, not on the date of amendment, but on the date of the original writ; that the effect of such relation back would be to deprive the person added of an accrued defence to the claim on the ground that it was statute-barred; and that this would be unjust to that person. I shall refer to this first basis of the rule of practice as the 'relation back' theory.
>
> The second and alternative basis for the rule is that, where a person is added as defendant in an existing action, the action is only deemed to have been begun as against him on the date of amendment of the writ; that the defence that the claim is statute-barred therefore remains available to him; and that, since such defence affords a complete answer to the claim, it would serve no useful purpose to allow the addition to be made. I shall refer to this second and alternative basis of the rule of practice as the 'no useful purpose' theory.

Lord Brandon LJ expressed his preference to the 'no useful purpose theory' when he said at p 641 of the report:

> It seems to me that the 'relation back' theory, which involves that the date on which an action is deemed to have been begun as against a person added as a defendant is the date of the original writ, is inconsistent with the rules of court, both in the High Court and the county court, to which I have just referred. By contrast it seems to me that the 'no useful purpose' theory, which involves that the date on which an action is deemed to have been begun as against a person added as a defendant is the date of amendment of the writ, is consistent with those rules. If it were permissible, therefore, to choose between the two theories by reference to the relevant rules of court alone, without regard to the case law on the subject, I should have no hesitation in concluding that the 'no useful purpose' theory was the correct one.

Continuing at p 642 of the report, Lord Brandon LJ had this to say:

> There is, in my view, a high degree of artificiality and unreality about the 'relation back' theory. There is no reason to quarrel with the general proposition that an amendment of a writ or a pleading relates back to the original date of the document amended, as stated by Lord Collins MR in *Sneade v Wotherton Barytes and Lead Mining Co* (1904) 1 KB 295 at p 297. This seems to me to be an entirely sensible proposition so long as the amendment concerned does not involve the addition of a new party, either as plaintiff or defendant, or the raising of a new cause of action, but involves only

> the modification, by addition, deletion or substitution, of pleas or averments made between existing parties in respect of a cause or causes of action already raised. Where, however, the amendment concerned involves the addition of a new party or the raising of a new cause of action, it appears to me to be unrealistic and contrary to the common sense of the matter to treat it as relating back in the same way.

Now, applying the principles distilled, from Lord Brandon LJ's decision in *Liff v Peasley & Anor*, the answer to the question posed would be to apply the 'no useful purpose theory' and when so applied it meant that the action was deemed to have begun as against the twelfth defendant on the date of the amendment of the writ which was on 16 August 1999 and having a life span of 12 months for the purpose of service from that date. This would be the correct interpretation to adopt when construing O 15 r 6 of the RHC to the facts of the present appeal and I am told that this interpretation would be in the nature of breaking new ground and if that would be the result, I would certainly be delighted.

Be that as it may, the dicta of Lord Brandon LJ in *Liff v Peasley & Anor* was approved by Lord Keith of Kinkel in the *Ketteman*'s case where at p 47 of the report, his Lordship Lord Keith of Kinkel remarked:

> Accordingly, I find myself in respectful agreement with the provisional view expressed by Brandon LJ in *Liff v Peasley* [1980] 1 All ER 623 at p 643, [1980] 1 WLR 781 at p 804 that the 'no useful purpose' theory, and not the 'relation back' theory, is the true basis of the rule of practice to which I have referred.

In applying vigorously the 'no useful purpose theory', the inescapable conclusion would be that the cause of action against the twelfth defendant can only accrue on the date of the amendment of the amended writ in encl 89 on 16 August 1999 and the service thereafter on 21 September 1999 must be construed to be good service in law. The life span of the writ as against the twelfth defendant was well within the range of 12 months at the time of its service.

It would be illogical for the plaintiff to extend or abridge the life span of the original writ in encl 1 from 14 September 1990 to the current year of service of the amended writ to the twelfth defendant, which was on 21 September 1999 simply because prior to the date of service of the amended writ to the twelfth defendant, there was no cause of action against the twelfth defendant in the original writ.

By way of a summary, it would be opportune to state that:

(1) an amendment of a writ under O 15 r 6 of the RHC by adding a new party to the original suit, would be equivalent to filing a new writ;

(2) there was no necessity to extend or abridge the life span of the original writ because time began to run for the purpose of service of the new writ on the date when the new writ was filed.

And consequently, for these reasons as well as for the other reasons adumbrated in this judgment, encl 114 must be allowed with costs.

Addendum

The RHC has since been amended by way of a gazette notification vide PU(A) 342, Jilid 44, Number 19, and it came into effect on 22 September 2000. That amendment affects, inter alia, O 6 r 7 of the RHC where the whole of para (2) was substituted with a new para (2) which reads as follows:

> (2) Subject to para (2A), where efforts to serve a writ on a defendant have been unsuccessful, the Court may by order extend the validity of the writ twice (in Sabah and Sarawak thrice and in admiralty actions 5 times), not exceeding 6 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order.

There is a new para (2A) which is added after the new para (2) reproduced above, and the new para (2A) is worded as follows:

> (2A) An application for renewal must be made before the expiry of the writ, ex parte by summons, supported by affidavit showing that efforts have been made to serve the defendant within one month of the date of the issue of the writ and that efforts have been made subsequent thereto to effect service.

The life span of the writ has been reduced from 12 months to six months by virtue of that amendment and this is clearly reflected when the amendment substitutes in para (1) of O 6 r 7 of the RHC the figures '12' with the figure '6'.

Are the amendments to the RHC particularly in regard to O 6 r 7 retrospective or prospective? To answer this all pervading question, I must examine three authorities in succession.

In *Goopan s/o Govindasamy v A Subramaniam & Anor* [1980] 2 MLJ 64 (FC), the facts of which were quite straight forward and they may be stated as follows. There the appellant was injured when she fell off a tractor trailer on 19 September 1972. At the time of the accident, the period for instituting the action against the public authority was twelve months, so that the right of action lapsed on 19 September 1973. However, on 13 June 1974 the Public Authorities Protection Ordinance 1948, was amended to extend the period for instituting action to 36 months. The appellant contended that by virtue of the amendment, his action was not time barred. The claim was dismissed by the High Court — see [1979] 2 MLJ 84, and the appellant appealed. On appeal, the Federal Court held that the amending Act was not truly procedural but affected vested rights, and the time for instituting the claim was not enlarged by the amending Act. The Federal Court also held that the amending Act was not retrospective in its operation and that it had no application to a cause of action which was time barred before the Act was introduced. Lee Hun Hoe CJ (Borneo) writing for the Federal Court, aptly said at p 66 of the report:

> It is whether the claim which commenced after the twelve-month period under the old Act and therefore time-barred could be revived by the new Act

which enlarged the time to thirty-six months. To answer the question the court has to determine whether the new Act affects procedure matter or substantive rights. If the amendment made by the new Act were regarded as merely procedural it would operate retrospectively. On the other hand, if it were regarded as affecting substantive rights, question of retrospectivity would not arise. We would refer to the observation of this court in *Bas Mara*'s case [1980] 1 MLJ 311 that:

> 'The distinction between procedural matters and substantive rights must often be of great fineness. Each case therefore must be looked at subjectively; there will inevitably be some matters that are classified as being concerned with substantive rights which at first sight might be considered procedural and vice versa.'

The distinction is so fine it is difficult to draw a dividing line. There are no clear guidelines. Whether the new Act affects procedure or rights depends upon the nature of the new Act. A substantive right may be secreted in the interstices of procedure. It has to be recognized that a change might be described as procedural in character yet may nevertheless affect a vested right adversely. We would repeat what was said by this court in *Bas Mara*'s case [1980] 1 MLJ 311 that the new Act was not truly procedural but affected vested rights and that the time for instituting the claim was not enlarged by the new Act. In other words, the new Act is not retrospective in operation and has no application to a cause of action which was time-barred being before the new Act was introduced. Not only on merits but also on question of law appellant cannot succeed. We would dismiss the appeal with costs. Deposit to respondents on account of taxed costs.

Appeal dismissed.

In *Malayan Banking Bhd v Siong Electronic Industries (1981) Sdn Bhd & Ors* [1994] 1 MLJ 704, Zakaria Yatim J had to consider the question of retrospectivity in the context of an amendment to O 32 r 13 of the RHC. In that case, the plaintiff applied for an order that summary judgment be entered against the defendants. The application was filed before the amendment to O 32 r 13 of the RHC. However, further affidavits were filed after the amendment. The question before Zakaria Yatim J was whether the amendment applied retrospectively. Learned counsel for the plaintiff contended that the application for summary judgment was filed before the amendment and thus affidavits filed after the amendment were not affected by the amendment. Whereas learned counsel for the defendants submitted that the amendment, being procedural in nature, was not governed by s 30 of the Interpretation Acts 1948 and 1967 ('the Interpretation Act') and had retrospective, effect. Zakaria Yatim J ruled in favour of the defendants and his Lordship held the view that at common law, where an amendment was concerned merely with matters of procedure, it should be construed retrospectively unless there was a clear indication that such construction was not the intention of Parliament. His Lordship further held that an amending statute could not be construed retrospectively if it affected any right that existed before the amendment. Furthermore, his Lordship also held the view that if the amending statute had the effect of altering a substantive law, or removing a substantive right or depriving a person of a vested right, it should not be construed retrospectively. Flowing from these

legal principles, his Lordship was of the opinion that the amendment did not affect any vested right of the plaintiff. It was said that the plaintiffs right to prosecute its claim against the defendants was not affected nor was the plaintiffs right to apply for summary judgment against the defendants affected. His Lordship held that the amendment was purely procedural in nature and there was nothing to indicate that it was not intended to apply retrospectively. In regard to s 30 of the Interpretation Act, his Lordship ruled that it did not apply because it was related and connected to substantive rights. After examining the submissions of the parties and alluding to the various authorities thereto, his Lordship at p 712 of the report concluded:

> In my opinion, the amendment does not affect any vested right of the plaintiff. The plaintiffs right to prosecute its claim against the defendants for the amount stated in the statement of claim is not affected. The plaintiffs right to apply for summary judgment against the defendants is also not affected. The amendment is purely procedural in nature and there is no indication that it is not intended to apply retrospectively.

In 1995, the Court of Appeal had occasion to consider the question of retrospectivity in the case of *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 295. In that case, the appellants who were members of the respondent society received a letter from the respondent stating that they had been suspended from their membership of the respondent's board and that they could make a representation in respect of their suspension at the general meeting of the respondent on 14 March 1993. On 5 March 1993, the appellants took out a writ claiming, inter alia, for a declaration that their suspension was invalid and obtained an ex parte interlocutory injunction restraining the respondent from reporting the appellants' suspension or enforcing it at the general meeting. The respondent applied to set aside the ex parte order and the judge allowed the application on the ground that the injunction had lapsed by effuxion of time by virtue of the retroactive effect of O 29 r 1(2B) of the RHC which came into effect on 1 October 1993. Incidentally, O 29 r 1(2B) of the RHC states that an interim injunction obtained on an ex parte application shall automatically lapse at the end of two weeks from the date on which it was granted unless sooner revoked or set aside. The appellants appealed and the issue confronting the Court of Appeal was whether O 29 r 1(2B) of the RHC applied retrospectively. Gopal Sri Ram JCA delivering the judgment of the Court of Appeal, allowed the appeal and his Lordship, in fine style, examined the law in these lucid words (see pp 296–297 of the report):

> Retrospectivity
>
> The traditional approach to the interpretation of statutes (which includes subsidiary legislation such as the Rules of the High Court 1980) in this area is contained in the general rule that, in the absence of express words or necessary implication, statutes affecting substantive rights are prospective while those affecting procedure are retrospective. In the case of rules of court, there is a rider to the general proposition. It is this. A rule of court should not be given

an interpretation that would result in unfairness or produce a manifest injustice: *Bank of America v Chai Yen* [1981] 1 MLJ 198 at p 199 (an authority not cited to the judge or to us by either side).

Another way of stating the rule is to say that a construction against retrospectivity is placed on a statute to save vested rights but not existing rights: *West v Gwynne* [1911] 2 Ch 1 at pp 11 and 12. But the rule, though easily stated in its different forms, is difficult in its application to a particular case. And it has been said that resort to such nomenclature as 'vested' and 'existing' is not particularly helpful in resolving difficulties: *Gardner & Co Ltd v Cone & Anor* [1928] All ER 458 at p 461.

The classification of a statute in general terms as procedural or substantive is singularly unhelpful; for a statute may at once be procedural for one purpose and substantive for another, depending upon the context in which it is being construed: *Maxwell v Murphy* (1957) 96 CLR 261; *In the Estate of Fuld (No 3)* [1968] P 675 at p 695; [1965] 3 All ER 776 at p 779; [1966] 2 WLR 717 at p 734, per Scarman J; *Re Dosabhai Ardeshir Cooper* (1950) 52 Bom LR 625. It calls for a construction of the statutory provision as a whole: *Ramanathan Chettiar v Lakshmanan Chettiar* [1963] 1 Mad LJ 46 at p 50.

In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, prima facie that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity. Contra, where the written law does not affect substantive rights.

His Lordship Gopal Sri Ram JCA relied on the Privy Council case of *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] AC 553; [1983] 1 MLJ 1 and at p 298 of the report, his Lordship said:

Later in his judgment he reiterated ([1983] 1 AC 553 at p 563; [1983] 1 MLJ at p 5):

'Their Lordships consider that the proper approach to the construction of the Act of 1974 is not to decide what label to apply to it, procedural or otherwise but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations.' (Emphasis added.)

All these authorities are thought provoking. I have to ask this vital question: would the amendment to O 6 r 7 of the RHC affect substantive rights of the plaintiff if applied retrospectively — adopting the approach of Gopal Sri Ram JCA in *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd.* In my judgment, the amendment to O 6 r 7 of the RHC should not be construed retrospectively. The plaintiff had filed the original writ against the original defendants when the life span of the writ was for a period of 12 months, and under the unamended r 7(1) of O 6 of the RHC there was no limit to extend the life span of the writ. This right to the plaintiff must be protected and it is for this reason that this court cannot construe the amendment to O 6 r 7 of the RHC retrospectively. To construe retrospectively would, borrowing the words of Lord Brightman in the case

of *Yew Bon Tew v Kenderaan Bas Mara*, 'impair existing rights and obligations' of the plaintiff. This was my judgment and I so hold accordingly.

Appeal allowed.

Reported by Jafisah Jaafar